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No. 05-493

IN THE

Supreme Court of the United States

ROBERT AYERS, Acting Warden,

Petitioner,

vs.

FERNANDO BELMONTES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the instruction approved in *Boyde* v. *California* place within the reach of the sentencing jury mitigating evidence of past good behavior in prison?

2. Would a negative answer to Question 1 be a new rule subject to the limitation of *Teague* v. *Lane*?

3. Should the second exception to *Teague* be declared *per se* inapplicable to new rules which go only to the discretionary choice of sentence within an authorized range and have no bearing whatever on guilt or eligibility for the punishment?

TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 5

Argument 7

I

Lockett v. *Ohio* is a failed and groundless decision; it should be narrowly interpreted and not expanded 7

A. A failed decision 7

B. A groundless decision 12

C. Tinkering 15

II

The Court of Appeals seriously misinterpreted *Boyde* v. *California* 16

III

So long as all mitigating evidence can be given effect, existing law does not require that it be considered in every possible way 18

IV

Rules affecting only the discretionary sentencing decision should be categorically excluded from the second *Teague* exception 21

Conclusion 26

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U. S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) 12

Atkins v. Virginia, 536 U. S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (2002) 25

Barefoot v. Estelle, 463 U. S. 880, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983) 20

Beard v. Banks, 542 U. S. 406, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004) 11, 22, 23

Belmontes v. Brown, 414 F. 3d 1094 (CA9 2005) 4, 5, 16, 17, 18, 20

Belmontes v. California, 488 U. S. 1034, 109 S. Ct. 848, 102 L. Ed. 2d 980 (1989) 4

Belmontes v. California, 492 U. S. 938, 110 S. Ct. 28, 106 L. Ed. 2d 639 (1989) 4

Belmontes v. Stokes, 427 F. 3d 663 (CA9 2005) 5, 16

Belmontes v. Woodford, 350 F. 3d 861 (CA9 2003) 5

Belmontes v. Woodford, 359 F. 3d 1079 (CA9 2004) 5

Benton v. Maryland, 395 U. S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969) 21

Bockting v. Bayer, 399 F. 3d 1010 (CA9 2005) 22

Boyde v. California, 494 U. S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990) 3, 16, 17, 18, 20

Brown v. Belmontes, 544 U. S. 945, 125 S. Ct. 1697, 161 L. Ed. 2d 518 (2005) 5, 16

Brown v. Payton, 544 U. S. 133, 125 S. Ct. 1432,
161 L. Ed. 2d 334 (2005) 3, 16, 18

California v. Brown, 479 U. S. 538, 107 S. Ct. 837,
93 L. Ed. 2d 934 (1987) 3

Callins v. Collins, 510 U. S. 1141, 114 S. Ct. 1127,
127 L. Ed. 2d 435 (1994) 14, 15

Coker v. Georgia, 433 U. S. 584, 53 L. Ed. 2d 982,
97 S. Ct. 2861 (1977) 25

Coleman v. Thompson, 501 U. S. 722, 115 L. Ed. 2d 640,
111 S. Ct. 2546 (1991) 25

Dred Scott v. Sandford, 60 U. S. (19 How.) 393,
15 L. Ed. 691 (1857) 7

Eddings v. Oklahoma, 455 U. S. 104, 71 L. Ed. 2d 1,
102 S. Ct. 869 (1982) 14

Enmund v. Florida, 458 U. S. 782, 73 L. Ed. 2d 1140,
102 S. Ct. 3368 (1982) 8, 25

Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346,
92 S. Ct. 2726 (1972) 14

Gideon v. Wainwright, 372 U. S. 335, 9 L. Ed. 2d 799,
83 S. Ct. 792 (1963) 21

Graham v. Collins, 506 U. S. 461, 113 S. Ct. 892,
122 L. Ed. 2d 260 (1993) 15, 20, 21

Gray v. Netherland, 518 U. S. 152, 116 S. Ct. 2074,
135 L. Ed. 2d 457 (1996) 26

Gregg v. Georgia, 428 U. S. 153, 49 L. Ed. 2d 859,
96 S. Ct. 2909 (1976) 7, 14, 25

Hitchcock v. Dugger, 481 U. S. 393, 95 L. Ed. 2d 347,
107 S. Ct. 1821 (1987) 10

Johnson v. Texas, 509 U. S. 350, 125 L. Ed. 2d 290,
113 S. Ct. 2658 (1993) 18, 19

Jurek v. Texas, 428 U. S. 262, 49 L. Ed. 2d 929,
96 S. Ct. 2950 (1976) 7, 10, 19

Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973,
98 S. Ct. 2954 (1978) 7, 8, 9, 10, 12, 13, 20

Mackey v. United States, 401 U. S. 667, 28 L. Ed. 2d 404,
91 S. Ct. 1160 (1971) 21

McGautha v. California, 402 U. S. 183, 28 L. Ed. 2d 711,
91 S. Ct. 1454 (1971) 13, 14, 15

Middleton v. McNeil, 541 U. S. 433, 158 L. Ed. 2d 701,
124 S. Ct. 1830 (2004) 18

Mills v. Maryland, 486 U. S. 367, 100 L. Ed. 2d 384,
108 S. Ct. 1860 (1988) 11, 23

Murray v. Carrier, 477 U. S. 478, 91 L. Ed. 2d 397,
106 S. Ct. 2639 (1986) 24

Penry v. Lynaugh, 492 U. S. 302, 106 L. Ed. 2d 256,
109 S. Ct. 2934 (1989) 10, 11, 19

People v. Belmontes, 45 Cal. 3d 744, 248 Cal. Rptr. 126,
755 P. 2d 310 (1988) 2, 3, 4

People v. Boyde, 4[illegible]Cal. 3d 212, 758 P. 2d 25,
250 Cal. Rptr. 83, 758 P. 2d 25 (1988) 4

People v. Brown, 45 Cal. 3d 1247, 248 Cal. Rptr. 817,
756 P. 2d 204 (1988) 4

People v. Payton, 3 Cal. 4th 1050, 13 Cal. Rptr. 2d 526,
839 P. 2d 1035 (1992) 4

Proffitt v. Florida, 428 U. S. 242, 49 L. Ed. 2d 913,
96 S. Ct. 2960 (1976) 7, 8, 9

Roper v. Simmons, 543 U. S. 551, 125 S. Ct. 1183,
161 L. Ed. 2d 1 (2005) 25

Rose v. Lundy, 455 U. S. 509, 71 L. Ed. 2d 379,
102 S. Ct. 1198 (1982) 22

Saffle v. Parks, 494 U. S. 484, 108 L. Ed. 2d 415,
110 S. Ct. 1257 (1990) 22

Sawyer v. Smith, 497 U. S. 227, 110 S. Ct. 2822,
111 L. Ed. 2d 193 (1990) 26

Sawyer v. Whitley, 505 U. S. 333, 120 L. Ed. 2d 269,
112 S. Ct. 2514 (1992) 24

Schlup v. Delo, 513 U. S. 298, 130 L. Ed. 2d 808,
115 S. Ct. 851 (1995) 24

Schriro v. Summerlin, 542 U. S. 348, 124 S. Ct. 2519,
159 L. Ed. 2d 442 (2004) 23

Silverman v. United States, 365 U. S. 505, 81 S. Ct. 679,
5 L. Ed. 2d 734 (1961) 15

Stogner v. California, 539 U. S. 607, 123 S. Ct. 2446,
156 L. Ed. 2d 544 (2003) 13

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334,
109 S. Ct. 1060 (1989) 21, 22, 23, 24

Tichnell v. State, 287 Md. 695, 415 A. 2d 830 (1980) ... 11

Tuilaepa v. California, 512 U. S. 967, 129 L. Ed. 2d 750,
114 S. Ct. 2630 (1994) 25

Tyler v. Cain, 533 U. S. 656, 150 L. Ed. 2d 632,
121 S. Ct. 2478 (2001) 23

United States v. Booker, 543 U. S. 220, 125 S. Ct. 738,
160 L. Ed. 2d 621 (2005) 12

United States v. Morrison, 529 U. S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) 13

Walton v. Arizona, 497 U. S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990) 14

Withrow v. Williams, 507 U. S. 680, 123 L. Ed. 2d 407, 113 S. Ct. 1745 (1993) 24

Woodson v. North Carolina, 428 U. S. 280, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) 7

United States Constitution

U. S. Const., Art. III, § 3 12

United States Statutes

28 U. S. C. § 2244(b)(2)(A) 22

28 U. S. C. § 2244(b)(2)(B)(ii) 24

Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 ..... 12, 13

State Statute

Cal. Penal Code § 190.3(k) 3

Miscellaneous

1 California Jury Instructions, Criminal (4th ed. 1979) 11

Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (1996) 16

California Dept. of Justice, Current Update of Death Penalty Judgments (May 23, 2006) 4, 5

J. Liebman, J. Fagan, & V. West, Broken System: Error Rates in Capital Cases 1973-1995 (2000) 11

Sixty-Third Report of the Standing Committee on Rules of Practice and Procedure, 5 Md. Reg. 1490 (1978) 11

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The Court of Appeals for the Ninth Circuit has once again exceeded the scope of its limited role on habeas corpus to strike down a death sentence by inventing a new restriction not contained in this Court's precedents. This overturning of a

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

validly imposed and affirmed sentence for a brutal and senseless murder is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Twenty-five years ago, Steacy McConnell was 19 years old and living in Victor, a small community in California's Central Valley. Defendant Fernando Belmontes and two other men, Bobby Bolanos and Domingo Vasquez, decided to burglarize Steacy's residence and steal her stereo and other items. As the group left Vasquez's residence, Belmontes armed himself with a steel dumbbell bar. See *People* v. *Belmontes*, 45 Cal. 3d 744, 760-761, 755 P. 2d 310, 315-316 (1988) ("*Belmontes I*"). Steacy's parents found her later that day, badly beaten but still alive. She died shortly afterward. See *id.*, at 760, 755 P. 2d, at 315.

Bolanos testified that defendant admitted killing Steacy; "he had to 'take out a witness' because she was home." *Id.*, at 762, 755 P. 2d, at 316. Belmontes admitted participating in the burglary and striking the initial blow knocking Steacy unconscious, but he tried to blame the actual killing on Vasquez. His story was inconsistent with the blood on his shoes and with the victim's defensive wounds. See *id.*, at 762-765, 755 P. 2d, at 316-318. The jury rejected this story and expressly found that Belmontes had personally killed Steacy and specifically intended to kill her, in addition to finding the burglary-murder special circumstance. See *id.*, at 760, 791, 794, 755 P. 2d, at 315, 336, 338.

In addition to the horrific circumstances of the crime, the case in aggravation included a prior conviction for accessory to voluntary manslaughter and Belmontes' aggravated assault on his pregnant girlfriend. The latter incident included Belmontes' acts of cutting the phone cord when she tried to call the police and dragging her back into the apartment when she tried to escape. See *id.*, at 796-797, 755 P. 2d, at 339.

The case in mitigation included bad childhood evidence and Belmontes' religious conversion and work while confined in the California Youth Authority two years before the murder. See *id.*, at 797-798, 755 P. 2d, at 339-340.

The penalty phase instructions and argument, taken as a whole, were more favorable to the defense than those in any of this Court's prior California penalty phase instruction cases. Unlike *California* v. *Brown*, 479 U. S. 538, 539 (1987), the jury was instructed not to be swayed by " 'mere sentiment, conjecture, [] . . . , prejudice, public opinion, or public feeling,' " with the word "sympathy" deleted. See *Belmontes I*, 45 Cal. 3d, at 800-801, 755 P. 2d, at 342. The jury was instructed on the statutory circumstances, including the catch-all mitigating circumstance of California Penal Code § 190.3(k), "[a]ny other evidence which extenuates the gravity of the crime." However, unlike *Boyde* v. *California*, 494 U. S. 370, 373-374 (1990), this instruction was supplemented with an instruction that " 'the mitigating circumstances which I have read for your consideration are given to you *merely as examples* of some of the factors that you may take into account as reasons for deciding not to impose a death sentence upon Mr. Belmontes.' " *Belmontes I, supra*, at 801, 755 P. 2d, at 342 (emphasis added by the court).[2] Unlike *Brown* v. *Payton*, 544 U. S. 133, 144 (2005), the prosecutor's argument expressly confirmed that the evidence at issue before this Court *could* be considered as mitigating, although he properly argued it was not strong. See *Belmontes I, supra*, at 801-802, 755 P. 2d, at 342-343. The jury returned a verdict of death. See *id.*, at 760, 755 P. 2d, at 315.

The California Supreme Court unanimously affirmed. "Viewing the instructions and arguments as a whole, we conclude there is 'no legitimate basis' for believing the jury was misled regarding its sentencing responsibilities." *Id.*, at

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2. In contrast to *Boyde*, one might say that this case involves an "adorned" factor (k) instruction. Cf. *Boyde*, 494 U. S., at 377.

802, 755 P. 2d, at 343 This unanimity further indicates that the instructions and arguments in this case were more clearly proper than those in the similar California cases this Court has reviewed to date. Cf. *People* v. *Brown*, 45 Cal. 3d 1247, 756 P. 2d 204 (1988) (on remand) (5-2); *People* v. *Payton*, 3 Cal. 4th 1050, 839 P. 2d 1035 (1992) (5-2); *People* v. *Boyde*, 46 Cal. 3d 212, 758 P. 2d 25 (1988) (4-3).

The state court also rejected Belmontes' claim that the penalty was disproportionate:

> "Defendant was convicted on extremely strong evidence that he committed an intentional murder of extraordinary brutality. He bludgeoned McConnell to death with an iron dumbbell bar; the force of the 15 to 20 some-odd blows leaving her with gaping wounds and a cracked skull. Her defensive wounds plainly evidenced a desperate struggle for life at defendant's hands. The murder occurred in the course of a calculated plan to burglarize the victim's home, to which defendant had gained entry on false pretenses. After the murder, defendant and his accomplices callously fenced the victim's stereo components for $100—purchasing beer with a portion of the proceeds." *Belmontes I*, 45 Cal. 3d, at 819, 755 P. 2d, at 354.

This Court denied certiorari on January 17, 1989. See *Belmontes* v. *California*, 488 U. S. 1034. Defendant petitioned for rehearing, which the Court denied on August 30, 1989. See *Belmontes* v. *California*, 492 U. S. 938.

On March 30, 1989, Belmontes filed a petition for writ of habeas corpus in the San Joaquin County Superior Court, the trial court. The petition was denied on April 7, 1989. See California Dept. of Justice, Current Update of Death Penalty Judgments (May 23, 2006) (periodic report filed with U. S. District Court, Northern Dist. of Cal.) ("Death Penalty Judgments"). On May 25, 1989, Belmontes filed a federal habeas petition, which the District Court held in abeyance for further exhaustion of state remedies. See *ibid.*; *Belmontes* v. *Brown*,

414 F. 3d 1094, 1111 (CA9 2005) ("*Belmontes V*"). Belmontes filed a habeas petition with the California Supreme Court on September 18, 1989, which the court denied on November 18, 1992. See Death Penalty Judgments. State remedies were thus exhausted in this case 14 years ago.

The District Court then took eight and a half years to decide the case, denying relief on May 15, 2001. Belmontes appealed, and a divided panel of the Court of Appeals granted relief. See *Belmontes* v. *Woodford*, 350 F. 3d 861 (CA9 2003) ("*Belmontes II*"). The full court denied rehearing en banc over the dissent of eight judges. See *Belmontes* v. *Woodford*, 359 F. 3d 1079 (CA9 2004) ("*Belmontes III*"). The warden petitioned for certiorari, and this Court vacated the decision and remanded for consideration in light of *Brown* v. *Payton, supra*. *Brown* v. *Belmontes*, 544 U. S. 945 (2005) ("*Belmontes IV*"). On remand, the Court of Appeals was again divided, and the majority "conclude[d] that *Payton* does not affect our holding in the present case." *Belmontes V*, 414 F. 3d, at 1101.

The full Ninth Circuit denied rehearing en banc, again over a vigorous dissent by seven judges. See *Belmontes* v. *Stokes*, 427 F. 3d 663 (2005) (*Belmontes VI*). This Court granted certiorari on May 1, 2006.

SUMMARY OF ARGUMENT

The Court of Appeals' decision in this case is an attempt to further expand the already bloated rule of *Lockett* v. *Ohio*. *Lockett* is a failed and groundless decision. It failed catastrophically in its central purpose to provide clear guidance and end the uncertainty regarding federal constitutional limitations on state capital sentencing procedure. It was groundless because the limitation it invented had no basis in the text or history of the Constitution or in the collective judgments of state legislatures. *Lockett* need not be overruled, but it should be frozen at its present boundaries, narrowly construed.

The Court of Appeals majority in the present case seriously misinterpreted *Boyde* v. *California*. It limited *Boyde*'s approval of the then-standard California catch-all instruction to evidence having a psychologically causal connection with the commission of the crime. *Boyde* contains no such limitation. It held that the instruction was sufficient to place all character and background evidence within the sentencer's reach.

Under *Johnson* v. *Texas*, capital sentencers are not required to consider mitigating evidence in every possible way. *Johnson* held that if mitigating evidence was within the sentencer's reach in answering a question on future dangerousness, it need not be considered for other mitigating implications the evidence might have. The present case is the mirror image of *Johnson*. Evidence of good behavior in a prior incarceration could be considered extenuating in itself under the instruction, and there is no constitutional requirement that it also be considered for its implications on future dangerousness in prison.

The Court of Appeals erroneously created a new rule on habeas corpus. *Graham* v. *Collins* establishes that rules of this type would not qualify for the second exception to the nonretroactivity rule of *Teague* v. *Lane*. More fundamentally, rules which govern the procedure for a discretionary sentencing choice within the legal range for the offense of conviction should be held categorically to *never* qualify for that exception. By definition, they do not go to questions of actual innocence or even to "innocence of the penalty" within the meaning of *Sawyer* v. *Whitley*. A great amount of pointless litigation and delay could be avoided by declaring a bright-line rule on this issue.

ARGUMENT

I. *Lockett* v. *Ohio* is a failed and groundless decision; it should be narrowly interpreted and not expanded.

The essence of the Court of Appeals' decision in this case is yet another attempt to expand the boundaries of the rule of *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion). It is useful at the threshold to examine the *Lockett* decision, its intended effect, and its actual effect.

A. A Failed Decision.

The *Lockett* plurality recognized what was needed in capital sentencing law at that point. "The signals from this Court have not . . . always been easy to decipher. The States now deserve the clearest guidance that the Court can provide; we have an obligation to reconcile previously differing views in order to provide that guidance." *Id.*, at 602. Not since *Dred Scott* v. *Sandford*, 60 U. S. (19 How.) 393 (1857) has any decision of this Court failed so completely in its central purpose. Instead of reconciling conflict, *Lockett* created new inconsistencies in previously settled law. As a result, instead of heralding an era of clarity and stability, *Lockett* opened the door to decades of confusion and chaos.

The case actually before the Court in *Lockett* was not difficult. The Ohio statute was essentially a mandatory death sentence law. Once an aggravating circumstance was found, death was the required sentence unless one of three unusual mitigating facts was also found: participation of the victim, duress, or mental illness. See *Lockett*, 438 U. S., at 607. This was not a "guided discretion" statute of the type upheld in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), *Proffitt* v. *Florida*, 428 U. S. 242 (1976), or *Jurek* v. *Texas*, 428 U. S. 262 (1976). It was a mandatory statute tempered only by exclusion of a handful of cases. As such, only a very minor extension of *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) would have been necessary to strike it down. Alternatively, Lockett's

sentence might have been set aside on the ground that she was a minor accomplice in a felony-murder case with no intent to kill, see 438 U. S., at 589-591 (plurality opinion); *id.*, at 628 (White, J., concurring in part and dissenting in part), a rule subsequently adopted in *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982). Instead of these limited and sensible approaches, the *Lockett* plurality handed down an edict of breathtaking sweep. "[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, *any* aspect of the defendant's character or record and any of the circumstances of the offense that the *defendant* proffers as a basis for a sentence less than death." *Lockett*, *supra*, at 604 (emphasis added and deleted, footnote omitted).

Given an extreme interpretation (as it subsequently was), this pronouncement was contrary to both *Proffitt* and *Jurek*. *Lockett* created confusion because it failed to specify just how far it was going in disapproving sentencing systems that the Court had previously approved.

Proffitt rejected the main attack on Florida's system, that it was unconstitutional "because it *allows* discretion to be exercised at each stage of a criminal proceeding . . . ." 428 U. S., at 254 (lead opinion) (emphasis added). *Proffitt* then went on to review the essential features of the Florida system and approve the system so described. The Florida statute specified the mitigating factors. *Id.*, at 249, n. 6. There was no catch-all factor.

> "On their face these procedures . . . appear to meet the constitutional deficiencies identified in *Furman*. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against *seven* mitigating factors to determine whether the death penalty shall be imposed." *Id.*, at 251 (emphasis added).

If that were not clear enough, the *Proffitt* Court modified its quotation of the Florida statute to insert "statutory" before

"mitigating." *Id.*, at 250. Thus, the *Proffitt* Court understood the Florida system to weigh on the mitigating side a specified list of enumerated factors. If the lack of a "catch-all" factor was a constitutional defect, it was apparent on the face of the statute. Yet *Proffitt* did not see it as a defect. The *Lockett* plurality notes that the *Proffitt* lead opinion made a tangential reference to the absence of explicitly limiting language in the state statute on mitigating factors. See *Lockett*, 438 U. S., at 606, and n. 15. However, that reference was made in connection with discussion of another point, whether a death sentence could rest entirely on nonstatutory aggravating factors. See *Proffitt*, 428 U. S., at 250, n. 8; *Lockett*, *supra*, at 629-630 (Rehnquist, J., dissenting in part). It certainly cannot support the proposition that *Proffitt* based its approval of the Florida system on any assumption that the sentencer was directed to consider nonstatutory mitigating factors.

Jurek's approval of the Texas system is even more strongly contrary to any such requirement. The Texas system called for the jury to answer specific questions, one of which was on future dangerousness. See *Lockett*, 438 U. S., at 607. Although the Texas Court of Criminal Appeals had said it would "permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show," *ibid.* (quoting *Jurek*, 428 U. S., at 272-273), the state court certainly had not said the jury would be instructed to base its answer on anything other than the statutory questions, nor could the statute be reasonably construed to allow it to do so.

The *Lockett* plurality attempted to reconcile its edict with *Proffitt* and *Jurek*, saying, "None of the statutes we sustained in *Gregg* and the companion cases *clearly* operated at that time to *prevent* the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." *Ibid.* (emphasis added). There is a world of difference between not clearly preventing something and clearly requiring the same thing. It was crystal clear that neither the Florida statute nor the Texas

statute previously approved by the Court affirmatively required the sentencer to consider any mitigating factors other than those listed in the statute, and *Lockett* did not expressly resolve whether such affirmative action was required.

The looming conflict between the *Lockett* plurality's rule and the precedents was not lost on the dissenters. Justice White called it an "about-face." *Id.*, at 622. Justice Rehnquist said it was "indisputably clear" that the opinion was "scarcely faithful to what has been written before." *Id.*, at 630-631. Even so, it would be many years before the full extent of the damage was known. Some states that had written their statutes and standard instructions in reliance on this Court's approval in *Proffitt* and *Jurek* continued to rely on those precedents in the absence of an honest overruling, misled by *Lockett*'s pretense of consistency.

Less than a month after *Proffitt*, James Hitchcock strangled and murdered 13-year-old Cynthia Driggers. Hitchcock had molested her, and he killed her when she said she would tell. See *Hitchcock* v. *Dugger*, 481 U. S. 393, 394 (1987). He was tried for that crime under the eminently reasonable belief that Florida law limited mitigating circumstances to the statutory list and that *Proffitt* had upheld that system. Hitchcock's sentence was overturned because his trial judge had committed the "error" of taking *Proffitt* at its word. This was contrary to *Lockett*, this Court held, see *id.*, at 399, in an opinion that curiously omits any mention of *Proffitt*.

The situation in Texas was even worse. Although Florida changed its statute and instructions on mitigating circumstances after *Lockett*, see *id.*, at 396-397, Texas continued to rely on *Jurek*. That case clearly held that the Texas system passed constitutional muster by allowing the defendant to "bring to the jury's attention whatever mitigating circumstances he may be able to show," 428 U. S., at 272, even though the jury *instructions* only asked about future dangerousness. See *id.*, at 272-274. In 1989, *Penry* v. *Lynaugh*, 492 U. S. 302, 328 decided that the instructions *Jurek* had found sufficient were not

sufficient under *Lockett*. The dissent noted that the majority's holding "flatly contradicts [*Jurek*'s] analysis." *Id.*, at 355 (opinion of Scalia, J.).

The rapacious growth of the *Lockett* rule has repeatedly frustrated the best efforts of state legislatures and judiciaries to craft capital sentencing instructions. Maryland enacted a post-*Gregg* statute in 1978. See *Tichnell* v. *State*, 287 Md. 695, 720, 415 A. 2d 830, 843 (1980). A committee of the state bar then crafted an instruction to meet the requirements of the statute and of this Court's precedents, including *Lockett*, as they were then understood. Sixty-Third Report of the Standing Committee on Rules of Practice and Procedure, 5 Md. Reg. 1490-1493 (1978). The state's highest court reviewed and approved the instruction and wrote it into the rules of court. See *Tichnell*, *supra*, at 727; 415 A. 2d, at 847; *Mills* v. *Maryland*, 486 U. S. 367, 384-389 (1988). It was used for a decade in every capital case until a narrow majority of this Court decided it was contrary to *Lockett*. See *Mills*, *supra*, at 384. The *Mills* rule was not dictated by *Lockett*, however. It was an expansion of *Lockett*. See *Beard* v. *Banks*, 542 U. S. 406, 416 (2004).

Similarly, the instruction at issue in the present case was also a standard state jury instruction, believed by experts in the field to conform to all applicable requirements at the time it was drafted. See 1 California Jury Instructions, Criminal, No. 8.84.1, pp. 335-336 (4th ed. 1979) ("CALJIC 4th"). The Court of Appeals is mistaken when it says CALJIC is a product of the legislature. See *Belmontes V*, 414 F. 3d, at 1134, n. 18. These instructions were the product of a committee of judges, prosecutors, and defense lawyers. See CALJIC 4th, at v.

A controversial study by opponents of the death penalty claimed that 68% of death penalty cases from 1973 to 1995 were infected with "serious error," defined as any defect that resulted in the sentence being reversed. See J. Liebman, J. Fagan, & V. West, Broken System: Error Rates in Capital Cases 1973-1995, text accompanying notes 40 and 130 (2000).

Yet it is painfully evident from cases such as *Hitchcock*, *Penry*, and *Mills* that a great many of these supposedly serious errors were not errors at all under the law in effect at the time of the trial. They were standard instructions genuinely and reasonably believed to conform to this Court's precedents, and they only became "error" long after trial as the *Lockett* cancer continued to metastasize. The serious error here is that well-deserved sentences of brutal murderers are repeatedly overturned despite their compliance with then-existing precedent.

The bitter irony is that all this chaos, confusion, and injustice has flowed from a decision that acknowledged "an obligation to reconcile previously differing views in order to provide [the clearest] guidance." *Lockett*, 438 U. S., at 602. The present case illustrates that this obligation is unpaid and long past due. *Lockett* has been a total failure.

B. A Groundless Decision.

Turmoil, confusion, and the unsettling of settled expectations are sometimes a price that must be paid when a constitutional principle has fallen into neglect and must be restored to its original understanding. That judgment appears to be implicit in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000) and its progeny. That is not remotely the case with *Lockett* v. *Ohio*. The sweeping mandate of that case was completely rootless.

Lockett found its rule to be required by the Eighth Amendment. See 438 U. S., at 604. The starting point for determining what any provision of the Constitution requires is to ask what it was understood to require when it was adopted. One of the best indications of what sentencing practices were considered constitutional by the Framers is the brief criminal code enacted by the First Congress, Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 ("1790 Act"). See, *e.g.*, *United States* v. *Booker*, 543 U. S. 220, 329 (2005) (Breyer, J., dissenting in part). The drafters of this act were clearly aware of constitutional limits. The treason section closely follows the constitutional limit. Compare 1790 Act, § 1, with U. S. Const., Art. III, § 3.

Common law crimes are only made federal within federal enclaves and on the high seas. Compare 1790 Act, § 3 (murder) and *id.*, § 9 (robbery on the high seas), with *United States* v. *Morrison*, 529 U. S. 598, 601-602 (2000) (gender-motivated violence as a federal offense).

In regard to the discretion of the sentencer, it is evident that the First Congress believed the matter was entirely within legislative control. Traitors and murderers "shall suffer death," 1790 Act, §§ 1, 3, and benefit of clergy was prohibited. See *id.*, § 31. This might be considered the first federal "truth in sentencing" act. Death means death. Conversely, the First Congress felt authorized to grant unlimited discretion where it thought that advisable. Persons convicted of bribery "shall be fined and imprisoned at the discretion of the court . . . ." *Id.*, § 21.

Lockett also found its command to be based on the Fourteenth Amendment, see 438 U. S., at 604, presumably on the theory that it incorporated the Eighth. Whatever the theory, *Lockett*'s requirement of unlimited mitigation could not reasonably be considered to have been constitutionally required during Reconstruction. The transition from mandatory to discretionary capital sentencing was under way at that time, but it was by no means complete. Congress did not follow the trend until three decades after it proposed the Fourteenth Amendment. See *McGautha* v. *California*, 402 U. S. 183, 199-200 (1971).

Original understanding can be the end point as well as the starting point for some constitutional provisions, see, *e.g.*, *Stogner* v. *California*, 539 U. S. 607, 611-612 (2003) (contemporary understanding of *Ex Post Facto* Clause), but this position would be hard to defend for the Cruel and Unusual Punishments Clause. A modern reenactment of the original penalty of "thirty-nine stripes" for falsifying court records, see 1790 Act, § 15, would doubtless be swiftly struck down. A punishment which was not considered cruel and was not at all unusual in 1789 may become both in later years, and hence

unconstitutional, if it is rejected universally or nearly so by society. See *Walton* v. *Arizona*, 497 U. S. 639, 670 (1990) (Scalia, J., concurring in part and concurring in the judgment) (noting conjunctive "unusual" requirement).

One might argue that the *Lockett* rule was made a constitutional requirement by the universal shift to complete discretion in the late nineteenth through mid-twentieth century, see *McGautha*, 402 U. S., at 199-201, but this argument runs into a brick wall in *Furman* v. *Georgia*, 408 U. S. 238 (1972) (*per curiam*). *Furman* held that the unlimited discretion statutes then in effect throughout the country were forbidden by the Eighth Amendment. The same provision of the Constitution cannot simultaneously forbid a practice and require the same practice, unless the goal is to intentionally set up an unresolvable paradox. See *Callins* v. *Collins*, 510 U. S. 1141, 1151-1152, 1159 (1994) (Blackmun, J., dissenting from denial of certiorari) (proposing judicial abolition of capital punishment due to conflicting court-created rules); cf. *id.*, at 1142 (Scalia, J., concurring) (concluding instead that if two rules conflict, one must be wrong).

The post-*Furman* statutes which were in effect at the time *Lockett* was decided provide no support for any contention that limitations on mitigation were "unusual" in the constitutional sense. Four of the five statutes examined in the *Gregg* cases limited mitigation in varying degrees. Georgia stood alone in a clear statutory endorsement of "anything goes" mitigation. See *Gregg*, 428 U. S., at 197; cf. *supra*, at 8-9 (Florida and Texas systems).

With no basis in original understanding, with an argument based on pre-*Furman* practice blocked by *Furman* itself, and with no basis in post-*Furman* statutes, *Lockett* stands as a naked judicial fiat. The rule proposed by the *Lockett* plurality and accepted by a majority in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982) was a legislative act of policy preference, not a principled exercise of the judicial power.

C. Tinkering.

"I no longer shall tinker with the machinery of death," Justice Blackmun declared in *Callins*, 510 U. S., at 1145 (opinion dissenting from denial of certiorari). Cessation of tinkering is an excellent idea, particularly when the tinkerer never had a license to tinker in the first place.

> "But the Federal Constitution, *which marks the limits of our authority* in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court." *McGautha*, 402 U. S., at 221 (emphasis added).

Amicus CJLF does not suggest that *Lockett* be overruled. Considerations of *stare decisis* weigh heavily in such a decision, and in any event that step should not be taken in a case which does not require it. We suggest that the Court "enforce a permanent truce between *Eddings* and *Furman*." *Graham* v. *Collins*, 506 U. S. 461, 498 (1993) (Thomas, J., concurring). A practice clearly prohibited by the *Lockett-Eddings* line can continue to be prohibited. The maintenance of these rules in their clearly established scope will cause little additional damage, because the states have already incorporated them into their statutes and standard jury instructions. However, *Lockett* should be strictly confined to its existing boundaries and not extended any further, with any doubts about its scope resolved in favor of the states' traditional constitutional authority to decide sentencing policy. There is no need in this case to overrule *Lockett*, but the Court should decline to extend it, "by even a fraction of an inch." Cf. *Silverman* v. *United States*, 365 U. S. 505, 512 (1961).

II. The Court of Appeals seriously misinterpreted *Boyde* v. *California*.

Six days after this Court decided *Brown* v. *Payton*, 544 U. S. 133 (2005), it vacated the Court of Appeals' prior decision in the present case and remanded for further consideration in light of *Payton*. See *Brown* v. *Belmontes*, 544 U. S. 945 (2005). While the holding of *Payton* is not on point because *Payton* is an AEDPA[3] case, see 544 U. S., at 147; *id.*, at 148-149 (Breyer, J., concurring), the obvious implication was that *Payton*'s discussion of *Boyde* v. *California*, 494 U. S. 370 (1990) clarified the meaning of *Boyde*, requiring a reexamination of the premises of the Court of Appeals' opinion in this case.

The panel majority was oblivious to the hint. See *Belmontes* v. *Brown*, 414 F. 3d 1094, 1101 (CA9 2005) ("*Belmontes V*"). The dissenters were not. See *id.*, at 1140-1141 (O'Scannlin, J., dissenting); *Belmontes* v. *Stokes*, 427 F. 3d 663, 665 (CA9 2005) (Callahan, J., dissenting from denial of rehearing en banc). No hint should have been needed. The error was apparent from *Boyde* on its face, even before *Payton*.

The Court of Appeals majority read *Boyde* as limiting its approval of California's prior catch-all instruction to evidence with a psychologically causal connection to the commission of the crime.

> "The Court held that, because the trial judge instructed the jury that it '*shall consider all of the evidence* which has been received during any part of the trial of this case,' there was no reasonable likelihood that the jury believed that factor (k) prevented it from considering the background and character evidence introduced by Boyde and its bearing on Boyde's commission of the crime. *Id.*, at 383 (emphasis in original). In other words, the Supreme Court held that the

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3. Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (1996).

> unadorned factor (k), at least when accompanied by an appropriate clarifying instruction, was constitutional as applied to mitigating evidence relating to the defendant's psychological make-up and history, which practically, if not legally, bore upon his commission of the crime and was offered for the purpose of reducing his culpability for the offense." *Belmontes V*, 414 F. 3d, at 1132 (footnote omitted).

This is an indefensible reading of the *Boyde* opinion. The phrase "and its bearing on *Boyde*'s commission of the crime" is neither a quote nor a paraphrase of anything in *Boyde*. Instead, the cited page says that, when considered with other factors "not associated with the crime itself," it is "improbable that jurors would arrive at an interpretation [of factor (k)] that precludes consideration of all *non-crime-related evidence*." *Boyde*, 494 U. S., at 383 (emphasis added). In addition, *Boyde* notes the jury would also have understood that it could consider Boyde's artistic ability, "because it showed that Boyde's criminal conduct was an aberration from otherwise good character." *Id.*, at 383, n. 5. This item of evidence has no connection with any conceivable theory of psychological causation for the crime, yet *Boyde* holds it was within the scope of this so-called "unadorned factor (k)" instruction.

If there were any doubt that *Boyde* includes all background and character evidence, not just evidence with a connection to the crime, the doubt was eliminated in *Payton*.

> "As to the text of factor (k), *Boyde* established that it does not limit the jury's consideration of extenuating circumstances solely to circumstances of the crime. See 494 U. S., at 382. In so holding, we expressly rejected the suggestion that factor (k) precluded the jury from considering evidence pertaining to a defendant's background and character because those circumstances did not concern the crime itself. *Boyde* instead found that factor (k), by its terms, directed the jury to consider any other circumstance that might excuse the crime, including factors related to a

defendant's background and character." *Payton*, 544 U. S., at 141-142.

Justice Breyer found two plausible distinctions in *Payton* from *Boyde* that might have prevailed in a non-AEDPA case: the pre-crime/post-crime distinction and the prosecutor's misleading argument. See *id.*, at 148-149 (concurring opinion). Neither of these distinctions is present in this case. See *supra*, at 3. Factually, this case is much more like *Boyde* than *Payton*. The "unadorned" instruction in *Boyde* was sufficient to inform the jury of the relevance of "precrime background and character," *id.*, at 148, and the "adorned" instruction and clarifying argument in this case did so even more clearly. See also *Middleton* v. *McNeil*, 541 U. S. 433, 438 (2004) (*per curiam*) (*Boyde*, ambiguous instructions, and clarifying arguments).

III. So long as all mitigating evidence can be given effect, existing law does not require that it be considered in every possible way.

After discussing the evidence in *Boyde* v. *California*, 494 U. S. 370 (1990), the Court of Appeals majority opinion says, "The same type of evidence, however, can serve an alternative forward-looking purpose, mitigating in a manner wholly unrelated to a petitioner's culpability for the crime he committed." *Belmontes V*, 414 F. 3d, at 1132. The implication that the defendant has a constitutional right to have his evidence considered for every purpose he wishes is flatly contrary to *Johnson* v. *Texas*, 509 U. S. 350 (1993).

In a sense, this case is a mirror image of *Johnson*, and the Court of Appeals majority opinion is a reflection of the dissent. Under the Texas system then in effect, the jury could consider mitigating circumstances only in the context of answering specific questions, one of which concerned future dangerousness. See *id.*, at 362-363.

The Texas Court of Criminal Appeals held that the jury could give mitigating effect to Johnson's youth through the dangerousness special issue. See *id.*, at 359. In this Court, the dissenters did not challenge that conclusion, but they contended that it was not enough. Future dangerousness and culpability are not the same thing, although they may be supported or refuted by the same evidence. See *id.*, at 376 (O'Connor, J., dissenting). Further, the dissent read *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982) as addressing a "constitutional requirement that a sentencer be allowed to give *full* consideration and *full* effect to mitigating circumstances . . . ." *Johnson*, *supra*, at 381 (emphasis in original). If this statement were found in an opinion of the Court issued prior to the day Belmontes' judgment became final, he would have a stronger case. The dissent, however, is not the law. It was not the day it was written, it is not today, and it was not in 1989.

The Court in *Johnson* held that accepting this argument would overrule *Jurek* v. *Texas*, 428 U. S. 262 (1976) and alter (*i.e.*, extend) the rule of *Lockett* and *Eddings*. See 509 U. S., at 372. "Instead of requiring that a jury be able to consider in some manner all of a defendant's relevant mitigating evidence, the rule would require that a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." *Ibid.* "As long as the mitigating evidence is within 'the effective reach of the sentencer,' the requirements of the Eighth Amendment are satisfied." *Id.*, at 368 (quoting *Graham* v. *Collins*, 506 U. S. 467, 475 (1993)).

Assuming for the sake of argument that California's catch-all factor does not include future nondangerousness as such, that would only be a constitutional defect if constitutionally relevant mitigating evidence were thereby placed beyond the reach of the sentencer. See *Penry* v. *Lynaugh*, 492 U. S. 302, 323 (1989) (evidence of retardation relevant only as aggravating, not mitigating, under Texas special issues); *Johnson*, 509 U. S., at 364-365 (discussing *Penry*).

The best predictor of future violence is past violence, see *Barefoot* v. *Estelle*, 463 U. S. 880, 922-923, n. 5 (1983) (Blackmun, J., dissenting), and the best evidence defendants can produce to show nondangerousness is a lack of a record of other serious crimes. They can also show past good behavior. Yet this evidence is precisely the "character or record" evidence that *Lockett*, 438 U. S., at 604, held the sentencer must consider and that *Boyde* held the California instruction does include. Whether the Constitution requires a sentencer to consider evidence of nondangerousness when it relates to neither character nor record can be decided in a case that presents that question.[4] No such evidence is involved in this case.

According to the Court of Appeals majority opinion, the most important part of Belmontes' case in mitigation was his conduct while incarcerated in the California Youth Authority. See *Belmontes V*, 414 F. 3d, at 1134. This included his work on a fire crew, his leadership and responsibility on that crew, and his participation in a religious program. See *id.*, at 1108. This is background and character evidence. This is the kind of evidence that *Boyde* determined was within the reach of the sentencer as a " 'circumstance which extenuates the gravity of the crime . . . .' " See 494 U. S., at 381 (quoting instruction).

When mitigating evidence supports more than one argument against a death sentence, *Johnson* held that allowing the sentencer to give effect to that evidence through one vehicle is sufficient. It also held that a contrary rule would require overruling *Jurek*. *Graham* v. *Collins* had previously held that such a rule would be a new rule as of 1993. See 506 U. S., at

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4. It would be exceedingly odd to hold that the Constitution *requires* "expert" prediction evidence in this area, a form of evidence so notoriously unreliable that three Justices of this Court concluded the Constitution *forbids* it. See *Barefoot*, 463 U. S., at 923 (Blackmun, J., dissenting).

477. *A fortiori*, such a rule would have been new when Belmontes' sentence became final four years earlier.

IV. Rules affecting only the discretionary sentencing decision should be categorically excluded from the second *Teague* exception.

Any claim that the extension of existing law made by the Court of Appeals in this case qualifies for the "watershed rule" exception to *Teague* v. *Lane*, 489 U. S. 288 (1989) could be dismissed with little more than a citation to *Graham* v. *Collins*, 506 U. S. 461, 477-478 (1993). However, an enormous amount of pointless litigation could be precluded by drawing a brighter line.

In his concurring and dissenting opinion in *Mackey* v. *United States*, 401 U. S. 667 (1971), Justice Harlan suggested an exception "for claims of nonobservance of those procedures that . . . are 'implicit in the concept of ordered liberty.' " *Id.*, at 693 (quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937)). These are the very basic rules of fundamental fairness that were considered part of the Fourteenth Amendment's Due Process Clause even before the incorporation doctrine.[5] The purpose of this exception appears to be to explain Justice Harlan's continued concurrence in granting habeas relief to prisoners with claims under *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), which was then only eight years old. See *Mackey*, *supra*, at 694.

While *Teague* adopted Justice Harlan's proposal in most other respects, it raised the bar for this exception even higher. To qualify for the second exception, a new rule would have to meet both the *Palko* test of fundamentalness and Justice

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5. The holding of *Palko* was that the Fifth Amendment's Double Jeopardy Clause was not such a rule. By the time of *Mackey*, the Double Jeopardy Clause was considered "incorporated," and *Palko* had been overruled. See *Benton* v. *Maryland*, 395 U. S. 784, 796 (1969).

Harlan's original proposal of " 'rules which significantly improve the pre-existing fact-finding procedures.' " *Teague*, 489 U. S., at 312 (quoting *Desist* v. *United States*, 394 U. S. 244, 262 (1969) (dissenting opinion)). Such a high standard raised the obvious question of whether any such rules remained to be made over a quarter century after *Gideon*. The *Teague* plurality answered cautiously, "we believe it unlikely that *many* such components of basic due process have yet to emerge." *Id.*, at 313 (emphasis added).

In the 17 years since *Teague*, this Court has not found a single new rule to qualify for this exception. See *Beard* v. *Banks*, 542 U. S. 406, 417 (2004). It has found a great many rules and proposed rules that do not. A handful of circuit cases have found rules to qualify, see, *e.g.*, *Bockting* v. *Bayer*, 399 F. 3d 1010, 1012-1013 (CA9 2005), cert. granted *sub nom. Whorton* v. *Bockting*, No. 05-595, May 15, 2006, but Congress had so little confidence in the Court of Appeals' decisions on retroactivity that it limited the retroactive rule exception for successive petitions to rules "made retroactive . . . by the Supreme Court." See 28 U. S. C. § 2244(b)(2)(A).

In the post-*Teague* cases, this Court has only marginally clarified the definition of the second exception. There are repeated statements along the lines that a qualifying rule would have to be of the "primacy and centrality" of *Gideon*. See, *e.g.*, *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990).

The farther we go down the path of the evolution of criminal procedure, the less likely it becomes that any "absolute prerequisite to fundamental fairness," *Teague*, 489 U. S., at 314, remains unrecognized. Justice Stevens recognized the connection between the fundamental nature of a rule and the time of its recognition in his dissent in *Rose* v. *Lundy*, 455 U. S. 509, 544, and nn. 9-11 (1982), where he illustrated "fundamental" by reference to the "classic grounds" for habeas corpus—all rules which predate *Gideon*.

Tyler v. *Cain*, 533 U. S. 656 (2001) contains an important shift in language which recognizes this further diminution in the probability of the existence of any new, fundamental rule. There the Court said, "it is unlikely that *any* of these watershed rules 'ha[s] yet to emerge.' " *Id.*, at 667, n. 7 (emphasis added); see also *Schriro* v. *Summerlin*, 542 U. S. 348, 352 (2004) (quoting *Tyler*). The shift from "many" in 1989 to "any" in 2001 recognizes that the probability is asymptotically approaching zero.

Because the second exception exists in theory, it must be litigated for every new rule in every circuit, except for the rules where this Court decides the question. Yet this Court cannot decide the question on every rule. The fact that the retroactivity of *Mills* v. *Maryland*, 486 U. S. 367 (1988) remained undecided for 16 years until *Beard* v. *Banks*, *supra*, despite long-standing circuit splits and numerous petitions for certiorari, vividly illustrates the problem. See, *e.g.*, Petition for Writ of Certiorari in *Dixon* v. *Williams*, No. 92-111 (requesting resolution of the circuit split 12 years before *Banks*). The *Teague* opinion denounced the "unfortunate disparity in the treatment of similarly situated defendants on collateral review" that resulted from varying decisions in the lower courts on retroactivity under the prior doctrine. *Teague*, 489 U. S., at 305. Yet the same result has followed under *Teague* from confusion over the second exception.

In the near future, *amicus* CJLF believes it will be appropriate for the Court to accept that there are *no* rules of the "primacy and centrality of . . . *Gideon*" remaining to be made. The second exception can then be formally retired as unnecessary and the litigation it creates ended. For the present case, we propose a more limited curtailment. We propose a bright-line rule that new rules which govern the process of choosing a sentence within the range for which the defendant is eligible are *per se* outside the second exception.

Both this Court and the Congress have altered the law of habeas corpus over the course of the last 30 years with two

goals in mind: to keep the writ available to correct fundamental miscarriages of justice and to curtail its misuse for endless relitigation of questions already reasonably resolved once. To reconcile these competing goals, new limitations on the writ have typically come with "actual innocence" exceptions. See *Murray* v. *Carrier*, 477 U. S. 478, 495-496 (1986); 28 U. S. C. § 2244(b)(2)(B)(ii). The unifying theme is to tighten restrictions in the interest of finality and federalism but relax them to avoid a fundamental miscarriage of justice. The *Teague* rule is an important part of the tightening, and the second exception is based on the actual innocence consideration. See *Withrow* v. *Williams*, 507 U. S. 680, 699-700 (1993) (O'Connor, J., concurring in part and dissenting in part).

The second exception to *Teague* is closely related to the actual innocence exception of *Carrier*, as *Teague* itself makes clear. See 489 U. S., at 313. Application of this exception to capital cases is therefore illuminated by two cases defining the *Carrier* exception: *Sawyer* v. *Whitley*, 505 U. S. 333 (1992) and *Schlup* v. *Delo*, 513 U. S. 298 (1995).

Sawyer noted that in an ordinary criminal case, the "fundamental miscarriage of justice" exception meant that the person was "actually innocent," which in turn simply meant that "the State has convicted the wrong person of the crime." See 505 U. S., at 340. In the context of capital sentencing, *Sawyer* rejected the argument that the concept extended beyond eligibility for the death penalty (*i.e.*, truth of at least one aggravating factor) to "the ultimate discretionary decision between the death penalty and life imprisonment." *Id.*, at 343. A "fundamental miscarriage of justice," for this purpose, means only a death sentence imposed on a person legally ineligible for it, not a sentence within the discretionary range. See *id.*, at 347. *Schlup* further distinguished actual innocence of the crime from ineligibility for the penalty. The greater importance of *real* innocence warranted a more relaxed standard for the exception to finality. See 513 U. S., at 324.

If we take the *Sawyer/Schlup* implementation of *Carrier* along with *Teague*'s reliance on *Carrier* for the second exception, a simple, clear, bright line becomes visible. Just as issues relating only to the discretionary sentencing decision *never* qualify for the "fundamental miscarriage of justice" exception of *Carrier*, so new rules relating only to the operation of that discretionary step *never* qualify for the second exception to *Teague*.

The bar for death-eligibility is very high. First, the defendant must be guilty of murder, not some lesser offense. See *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion). The class of murderers must be further narrowed by objective factors in the form of aggravating circumstances or a higher degree of murder. See *Tuilaepa* v. *California*, 512 U. S. 967, 971-972 (1994). The defendant must not qualify for a growing list of exclusion criteria. See *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982) (minor accomplice without intent to kill); *Atkins* v. *Virginia*, 536 U. S. 304, 318 (2002) (mentally retarded); *Roper* v. *Simmons*, 543 U. S. 551, 574-575 (2005) (age). Once the case has cleared all those hurdles, it is difficult to imagine a case where the justice of the death penalty is not a matter of opinion on which reasonable people can and will differ.

A bright-line rule "is designed to avoid the costs of excessive inquiry where [it] will achieve the correct result in almost all cases." *Coleman* v. *Thompson*, 501 U. S. 722, 737 (1991). Categorically excluding the regulation of discretionary sentencing from the second *Teague* exception satisfies that criterion. The only rules in this area that are even arguably of the "primacy and centrality of . . . *Gideon*" are those of *Gregg* v. *Georgia*, 428 U. S. 153 (1976) and its companion cases. Since then, every defendant sentenced to death has been entitled to a narrowed definition of eligibility and an individualized consideration of mitigating circumstances. By comparison, all the rules created since then have amounted to fine tuning within these broad outlines.

The continued existence in theory of an exception which never applies in fact serves only to delay justice in cases where it is already long overdue and to squander resources better spent elsewhere. We have devoted far too large a share of our case review resources on the claims of unquestionably guilty murderers, claims which have nothing to do with guilt or innocence.

The only consequence of a *Teague* bar is that the habeas petitioner's sentence is judged by the standards in effect at the time of his direct appeal. See *Sawyer* v. *Smith*, 497 U. S. 227, 243 (1990). That includes all the requirements of *Gregg* and its companion cases. For issues having no relation whatever to actual innocence of the murder, that is sufficient to avoid a fundamental miscarriage of justice.

The issue in the present case has nothing to do with guilt of the offense and nothing to do with eligibility for the death penalty. The second-exception argument could be summarily dismissed, as this Court has done in many cases. See, *e.g.*, *Gray* v. *Netherland*, 518 U. S. 152, 170 (1996). However, a substantial step toward achieving the goals set out in *Teague* could be achieved by simply declaring the second exception to be *per se* inapplicable to rules governing the discretionary sentencing decision.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

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